REID et al. v. MEDLEY'S ADM'R.

Jan. 13, 1916.

[87 S. E. 616.]

1. **Trial (§ 242*) — Instructions—Number.**—Unnecessary instructions which can only tend to confuse the jury should not be given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 569-576; Dec. Dig. § 242.]

2. **Master and Servant (§ 189*)—Injuries to Servant—Negligence—"Vice Principal."**—Where the foreman who was directing the work had no authority to hire or discharge the other servants, he is not a vice principal, and the master is not liable for his negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 427-435, 437-448; Dec. Dig. § 189.

For other definitions, see Words and Phrases, First and Second Series, Vice Principal.]

3. **Master and Servant (§§ 101, 102*)—Injuries to Servant—Safe Place to Work.**—Where a master engaged his employees to raise a house, and the place of work was safe when they began, the master is under no duty to see that the place of work remains safe, as it is changed from time to time by the employees.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.]

4. **Master and Servant (§ 153*)—Instructing Servant—Experienced Servant.**—Where the deceased, a servant, was a young man of 17, vigorous and well-grown, who had been working around buildings for several years, there is a presumption that he had capacity to be sensible of danger and avoid it, and, as this presumption will stand until overthrown by clear proof, no particular care was necessary because of deceased's nonage.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 314-317; Dec. Dig. § 153.]

5. **Death (§ 24*)—Contributory Negligence of Parent.**—Where a father, who was directing and participating in the work of raising a house, negligently allowed his infant son, who was also working, to go into a place of danger, the father's contributory negligence will bar his recovery for the son's death.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 25, 26; Dec. Dig. § 24.]

6. **Evidence (§ 512*)—Opinion Evidence—Expert Testimony.**—In an action for the death of an infant workman, killed in raising a house, opinion evidence as to whether the work was negligently done may, in the discretion of the court, be received.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2316; Dec. Dig. § 512.]

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

Error to Circuit Court, Roanoke County.

Action by W. L. Medley, as administrator of the estate of Elmer K. Medley, deceased, against W. S. Reid and another. There was a judgment for plaintiff, and defendants bring error. Reversed and remanded.

Welborn & Jamison, of Roanoke, for plaintiffs in error.
Kime, Fox & McNulty, of Roanoke, for defendant in error.

HARRISON, J. This suit was brought by W. L. Medley, as administrator of his deceased infant son, to recover of the defendants damages for the death of the deceased, which he alleged was caused by their negligence. There was a verdict and judgment in favor of the plaintiff for $1,000, which we are asked to review.

It appears that the deceased was engaged with other employees in the work of raising a frame house belonging to the defendant Reid, and that during the progress of the work the house careened and fell, catching the deceased under one edge of the building, inflicting injuries from which he died.

[1] The record brings up some 30 instructions which were given and refused, to be passed on by this court. The issues in the case were narrow, and could have been properly submitted to the jury under a few pertinent instructions. The mass of instructions given and refused were, for the most part, wholly unnecessary, and the large number given were well calculated to confuse and mislead the jury. This court has so often condemned this practice of giving to the jury an unnecessary number of instructions that we will not do more than advert to the subject at this time. We will only notice such of the instructions as seem necessary properly to dispose of the case.

[2] By instruction No. 1 given for the plaintiff the jury were told that, if E. S. Phelps was employed by the defendant Reid as foreman in charge of the work of raising the defendant's house, and that the method employed in doing the work was not such as a reasonably prudent man would adopt for the purpose, and that the deceased was directed by Phelps, while acting as foreman, to go under the house, and that the building fell and killed him, without fault on his part, by reason of such inadequate method of doing the work, then the defendants were guilty of negligence, and the jury should assess to the plaintiff damages, etc.

On the morning of the accident five men, including the owner, were engaged upon the work of raising this house. Assuming that Phelps was acting as foreman, it by no means follows that because he directed the deceased to go under the house that the owner was thereby made liable for the death of the plaintiff's

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intestate. These men were each employed by the defendant Reid, who was having the work done, and there is no evidence that Phelps had any authority to employ or discharge one of them. The ordinary boss or foreman of a gang of hands with whom he works, who has no power to employ or discharge members of the gang, is a fellow servant with the other members of the gang. His superiority in authority does not change his relation to the gang. Richmond Locomotive Works *v.* Ford, 94 Va. 627, 27 S. E. 509.

The mere fact that one servant is superior in authority to another does not have the effect of changing his relation of fellow servant, unless his superiority places him in the position of principal or vice principal. N. & W. R. Co. *v.* Nuckol's Adm'r, 91 Va. 193, 21 S. E. 342.

The vice of this instruction is that it puts Phelps in the category of a vice principal performing a nonassignable duty. It is clear that he was a fellow servant of the men with whom he was working in raising the house, and therefore that any injury resulting to the deceased because of his negligence was due to the negligence of a fellow servant and the injured servant could not recover.

The defendants' instruction No. 20, which was refused, told the jury that, in the absence of a statutory enactment, the master's liability for the negligent act of one servant against another was determined solely by the question whether the act of the negligent servant was in the performance of a duty imposed by the common law upon the master towards the injured servant, and not whether the negligent servant has been placed by the master in a position of higher grade, or in authority and control over the injured servant. Therefore, although the jury may believe that E. S. Phelps was employed as a foreman, yet, if he was not in the performance of a nonassignable duty, he was still a fellow servant of Elmer K. Medley, and such fellow service is a bar to a recovery, and you should find for the defendants.

It follows from what has been already said with respect to plaintiff's instruction No. 1 that the court erred in refusing this instruction. It correctly states the law applicable to the facts of the case and should have been given. Norfolk & W. R. Co. *v.* Houchins' Adm'r, 95 Va. 398, 28 S. E. 578, 46 L. R. A. 359, 64 Am. St. Rep. 791.

[3] The plaintiff's instruction No. 2 tells the jury that, if they believe from the evidence that the defendants did not exercise ordinary care to provide a reasonably safe place in which the deceased was to work, and that he was ignorant of the fact, and could not by the exercise of ordinary care have discovered the danger, it was the duty of both the owner and the foreman to in-

form him of the danger; and, if they believe from the evidence that Phelps was present and ordered the deceased to work in such place without informing him of the danger, and as a result thereof the plaintiff's intestate was killed, without fault on his part, then the defendants were liable.

There is the same objection to this instruction that there was to the plaintiff's first instruction. It tells the jury that all that was necessary to fix upon Reid, the owner, liability for failure to warn the deceased of dangers was that the jury should believe that E. S. Phelps was present and acting as foreman, directing the job. We have already seen that Phelps was a fellow servant of the deceased, and that no negligence, therefore, of his could fix any liability upon the owner of the building for the death of the plaintiff's intestate. The instruction under consideration is, we think, further defective because it is not applicable to the facts of the case. There is no evidence that the owner of the building had failed to provide a reasonably safe place. The place where the work was to be done was unquestionably safe in the first instance, and the conditions as to safety consisted in the character of the work itself, which was necessarily changing as the work progressed. With these changing conditions plaintiff's intestate was acquainted, having assisted in bringing them about. The master is not required to follow up his servants every moment to see that they keep their place of work in a safe condition. The master owes the servant no greater duty in this respect than the servant owes himself. Black's Adm'r *v.* Portland Cement Co., 104 Va. 450, 51 S. E. 831. This exception to the rule requiring the master to exercise ordinary care to provide a reasonably safe place for his servants to work has been repeatedly recognized by this court; the exception arising when the servant is engaged in work of such a nature that the conditions of the place of work, in regard to safety, are constantly changing. Coal Co. *v.* Wells, 96 Va. 416, 31 S. E. 614; Locomotive Works *v.* Ford, supra.

In the case last cited it is held to be—

"the duty of the master to furnish and maintain a reasonably safe place in which the servant is to work, and this duty is personal to the master. But, if the place is reasonably safe in the first instance, and is afterwards rendered unsafe by the negligent manner in which the boss or foreman of a gang of hands directs the work to be done, in doing which an injury is inflicted, the master is not liable for such injury."

"Both upon principle and authority it is clear that a master cannot be deemed culpable on the ground of an omission to give warning, where the servant already possesses sufficient knowledge of the conditions to enable him to take appropriate precautions

for safeguarding himself. Accordingly, a master 'is not required to keep special watch over his employee and warn him of common dangers to which he may be subjected in the performance of his ordinary duties.' The reluctance of the courts to allow a servant to recover for an injury due to such a danger is especially strong in cases where the isolated event which caused the injury occurred during the work of constructing or repairing a part of the master's plant." 3 Labatt (2d Ed.) § 1113.

This court, in Fields *v.* Virginian Railway Co., 114 Va. 558, 77 S. E. 501, says:

"The law does not make it the duty of a master to warn a servant of an open and obvious danger of which he knows, or could have known by the exercise of ordinary care. Such dangers are risks incident to the employment."

[4] By instruction No. 3 given for the plaintiff the jury were told that the degree or amount of care imposed upon a master was commensurate with the youth, inexperience, and lack of capacity of the servant. This instruction was not sufficiently full to submit the subject dealt with fairly to the jury. On the same phase of the case the defendants asked for the following instruction, which was refused:

"The court instructs the jury that an infant over the age of 14 years is presumed to have the capacity to understand and be sensible of danger, and that, if the plaintiff in this case relies on the incapacity of the deceased to understand and appreciate the danger of the work in which he was engaged, the burden is on the plaintiff to prove such incapacity by a preponderance of the evidence sufficient to satisfy the minds of the jury, and the plaintiff must further prove by a preponderance of the evidence, not only that Elmer K. Medley, the deceased, was incapable of understanding and appreciating the danger, but also that such incapacity was known or should have been known by the defendants; and, if the size and appearance of said Elmer K. Medley was such as to indicate that he was a full-grown man, then the defendants would not be charged with constructive notice of such incapacity, and actual notice of the same must be shown to have been given to said defendants."

This instruction is supported by the evidence, correctly states the law applicable to this phase of the case, and therefore should have been given. The evidence shows that the plaintiff's intestate was a well-grown, vigorous young man, 17 years of age, and weighing 162 pounds, who had been working around and about buildings for some 2 years.

"An infant more than 14 years old is presumed to have sufficient capacity to be sensible of danger and have the power to

avoid it; and this presumption will stand until overthrown by clear proof of the absence of such discretion as is usual with infants of that age." 3 Labatt, § 1156.

We have found no evidence in the record to overthrow or rebut the presumption that the deceased was sufficiently developed, both mentally and physically, to be capable of understanding and appreciating the dangers incident to his employment.

[5] The defendants asked for an instruction, which was refused based upon the theory that, when an action for the negligent injury of an infant is brought by the parent, for the parent's own benefit, the contributory negligence of such parent may be shown in bar of the action. The evidence tends to show that W. L. Medley, the father of deceased, was present at the time of the accident, and was engaged in the work, directing the manner in which it was done, and that he knew, or by the exercise of reasonable care ought to have known, of the danger incident to the manner in which the house was being raised, stayed, and shored; and yet he stood by in silence and allowed his son to go into a position of danger.

The rule that the negligent father cannot recover is founded upon the fundamental principle that no one can acquire a right of action by his own negligence. The principle involves a maxim as old as the common law itself. R. F. & P. R. R. Co. *v.* Martin's Adm'r, 102 Va. 201, 45 S. E. 894. In the case cited this subject is elaborately discussed, and numerous authorities cited which need not be here set out; they being practically unanimous to the effect that the negligence of a parent of a minor is a bar to an action by him to recover damages for an injury to such minor. The policy of the law is not to allow a recovery for the benefit of a wrongdoer. It is clear, upon principle and authority, that the court erred in refusing to give the instruction referred to.

[6] We are of opinion that the objection taken by the defendants to the admission of certain expert testimony was without merit. This evidence consisted of the answers of three expert witnesses to a hypothetical question as to the propriety of the method employed by the defendants in raising the house. The admissibility of expert evidence is largely a matter in the discretion of the trial court, and its ruling allowing a witness to so testify will not be reversed unless it clearly appears that he was not qualified. Locomotive Works *v.* Ford, supra; Lane Bros. *v* Bauserman, 103 Va. 146, 48 S. E. 857, 106 Am. St. Rep. 872. We do not perceive that this discretion was abused in the present case.

It follows from what has been said that the judgment complained of must be reversed, the verdict of the jury set aside,

and a new trial granted, if the plaintiff be so advised, to be had not in conflict with the views expressed in this opinion.

Reversed.

CARDWELL, J., absent.

Editor's Note.—Some rules taken from Norfolk, etc., R. Co. *v.* Nuckols, 91 Va. 193, 207:

"A person entering the service of another assumes all risks naturally incident to that employment, including the danger of injury by the fault or negligence of a fellow servant. The liability does not depend upon the fact that the servant injured may be in a different department of the service from the wrongdoer. The test is, were the departments so far separated from each other as to exclude the probability of contact, and of danger from the negligent performance of their duties by employees of the different departments? If they are so separated, then the servant is not to be deemed to have contracted with reference to the negligent performance of the duties of his fellow servant in such other department. The liability does not depend upon gradations in employment, unless the superiority of the person causing the injury was such as to put him in the category of principal or vice-principal. It is the duty of the employer to exercise reasonable care, prudence and discretion in ascertaining the character, habits and fitness of his employees for the discharge of the duties to be assigned to them, and, by proper supervision and superintendence, to keep himself informed as to the manner in which the duties intrusted to them are performed. Where the injury to the servant has been occasioned by the default of a fellow servant, concurring with the negligence of the master, the latter is liable as though he only were at fault."

The fellow servant doctrine has since been abolished to a certain extent as to employees of railroads. Va. Const. Art. XII, § 162; Va. Code, § 1294k. For discussion of the constitutional and statutory provisions, see 8 Va. Law Reg. 245. See also Virginia & S. W. Ry. Co. *v.* Clowers, 102 Va. 867, 47 S. E. 1003.